

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

THOMAS K. MILLS,

Plaintiff,

v.

ZACHERY JONES, et al.

Defendants.

No. 1:23-cv-01214-JLT-SAB (PC)

FINDINGS AND RECOMMENDATION
RECOMMENDING PLAINTIFF'S FOURTH
MOTION FOR SUMMARY JUDGMENT BE
DENIED

(ECF No. 68)

Plaintiff is proceeding pro se and in forma pauperis in this action filed pursuant to 42 U.S.C. § 1983.

Currently before the Court is Plaintiff's fourth motion for summary judgment, filed June 6, 2024. (ECF No. 68.) For the same reasons as stated in the Court's April 23, 2024, Findings and Recommendations, Plaintiff's fourth motion for summary judgment must be denied.

I.

DISCUSSION

Rule 56(d) of the Federal Rules of Civil Procedure provides a procedure by which a party may avoid summary judgment when such party has not had sufficient opportunity to discover affirmative evidence necessary to oppose the motion. See Garrett v. San Francisco, 818 F.2d 1515, 1518 (9th Cir. 1987). In particular, Rule 56(d) provides that a court may deny a summary

1 judgment motion and permit the opposing party to conduct discovery where it appears that the
 2 opposing party, in the absence of such discovery, is unable to present facts essential to opposing
 3 the motion. Fed. R. Civ. P. 56(d). A pending discovery motion is sufficient to raise a question as
 4 to whether the party opposing summary judgment should be permitted additional discovery, even
 5 if no request under Rule 56(d) has been made. See Garrett, 818 F.2d at 1518. The Ninth Circuit
 6 has made clear that in cases involving pro se prisoners, summary judgment is not favored when
 7 discovery requests for relevant evidence are pending. In particular, the Ninth Circuit has noted:

8 Under Rule 56(f) [(the predecessor to current Rule 56(d))], the court may postpone ruling
 9 on a summary judgment motion where the nonmoving party needs “additional discovery to
 10 explore ‘facts essential to justify the party's opposition.’ ” Crawford-El v. Britton, 523 U.S. 574,
 11 599 n.20 (1998) (quoting Fed. R. Civ. Pro. 56(f)). Though the conduct of discovery is generally
 12 left to a district court's discretion, summary judgment is disfavored where relevant evidence
 13 remains to be discovered, particularly in cases involving confined pro se plaintiffs. Klinge v.
 14 Eikenberry, 849 F.2d 409, 412 (9th Cir. 1988); Harris v. Pate, 440 F.2d 315, 318 (7th Cir. 1971)
 15 (Stevens, J.) (observing that the combined disabilities of self-representation and confinement
 16 hinder a plaintiff's ability to gather evidence). Thus summary judgment in the face of requests for
 17 additional discovery is appropriate only where such discovery would be “fruitless” with respect to
 18 the proof of a viable claim. Klinge, 849 F.2d at 412; Jones v. Blanas, 393 F.3d 918, 930 (9th
 19 Cir. 2004) (parallel citations omitted and brackets added). Plaintiff's motion for summary
 20 judgment is premature as Defendants have not had sufficient opportunity to conduct discovery as
 21 it was just opened on April 10, 2024. (ECF No. 51.)

22 In addition, Plaintiff did not comply with Local Rule 260(a) which requires the party
 23 moving for summary judgment to provide a “Statement of Undisputed Facts” that cites to the
 24 evidentiary basis for each undisputed fact. Federal Rule of Civil Procedure 56(c) similarly
 25 mandates that all undisputed facts be based on “materials in the record” such as affidavits or
 26 depositions. Although Plaintiff has attached his own declaration to the motion for summary
 27 judgment, he has not included a separate statement of undisputed facts as required by Local Rule
 28 260(a). As a result, Plaintiff's motion is procedurally deficient under Fed. R. Civ. P. 56 and

1 Local Rule 260(a). Accordingly, Plaintiff's motion for summary judgment must be denied.

2 **II.**

3 **RECOMMENDATION**

4 Based on the foregoing, it is HEREBY RECOMMENDED that Plaintiff's fourth motion
5 for summary judgment (ECF No. 68) is DENIED, without prejudice.

6 This Findings and Recommendation will be submitted to the United States District Judge
7 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **fourteen (14)**
8 **days** after being served with this Findings and Recommendation, the parties may file written
9 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
10 Findings and Recommendation." The parties are advised that failure to file objections within the
11 specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834,
12 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

13 IT IS SO ORDERED.

14 Dated: **June 10, 2024**

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16 UNITED STATES MAGISTRATE JUDGE